Supreme Court, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

Docket No. 91-1110

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

WALLACE S. HARWOOD, JR.,

Petitioner,

v.

PARTREDEREIT af. 15.5.81,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

SUPPLEMENTAL APPENDIX

Peter W. Rowe
Stackhouse, Rowe & Smith
1600 First Virginia Bank Tower
555 Main Street Norfolk, VA 23514
(804)623-3555

Counsel for Petitioner

SUPPLEMENTAL APPENDIX

OPINION OF THE UNITED STATES DISTRICT COURT..1

ORDER DENYING REHEARING.....14

WALLACE S. HARWOOD, JR., *Plaintiff*

v.

PARTREDEREIT AF 15.5.81, *Defendant*

United States District Court,
Eastern District of Virginia
(Norfolk Division)
January 3, 1990
Civil No. 89-638-N

PERSONAL INJURY - 13147.
Miscellaneous Persons - PILOTS - 153.
Damages for Injury and Death - SEAMEN - 11.
Who Are, Definition, Crew.

Harbor pilot, injured when ship's ladder gave way, is not a Jones Act seaman because he was not permanently attached to the vessel. Whether he is entitled to claim for unseaworthiness, *not decided* pending development of additional facts.

Peter W. Rowe (Stackhouse, Rowe & Smith) for *Plaintiff Harwood*
Philip N. Davey (Hunton & Williams) for *Defendant Partredereit*

ROBERT G. DOUMAR, D.J.:

This matter came before the Court on December 12, 1989, on a motion for partial summary judgment. For the reasons stated below, the Court grants defendant's motion for summary judgment regarding plaintiff's status

as a seaman under the Jones Act and denies without prejudice defendant's motion for summary judgment as to plaintiff's status as a seaman regarding the doctrine of warranty of seaworthiness. The reasons for this Court's decision are set forth below.

I. *Facts*

On the night of December 16, 1987, M/V *Captain Most*, an oceangoing ship, approached the Hampton Roads port, off the shore of Cape Henry, Virginia. Plaintiff, a licensed Virginia branch pilot, approached the ship in a pilot launch in order to pilot the vessel into the harbor in accordance with Virginia law.

A pilot's ladder was lowered from the *Captain Most* by officers and crew members of the ship for plaintiff's use in boarding the

vessel. While he was climbing up the ladder, the ladder broke and plaintiff fell into the water. Plaintiff alleges that this fall caused him to suffer a torn rotator cuff and other injuries that now prevent him from working a full schedule.

II. *Plaintiff's Status Under the Jones Act*

The Fourth Circuit test for Jones Act seaman status was set forth in *Whittington v. Sewer Construction Co.*, 451 F.2d 427, 436 (4 Cir. 1976) and has been reiterated in *Stephenson v. McLean Contracting Co.*, 1989 AMC 728, 729, 863 F.2d 340, 341 (4 Cir. 1988) cert. denied, 490 U.S._____(1989). *Stephenson* says:

> "The Court [in *Whittington*] identified three requirements for a worker to be considered 'a member of a crew:' (1) the

worker must be more or less permanently attached to a vessel or fleet; (2) the worker must be one whose duties serve naturally and primarily as an aid to navigation in the broadest sense; and (3) the vessel must be in navigation."

Plaintiff, here, fails the first prong of this test. He was in no way "more or less permanently attached" to the *Captain Most*. Plaintiff, in his affidavit, states, "Plaintiff practices his profession as an individual. He has no employees and is not employed by anyone." The record is devoid of any evidence that plaintiff was assigned permanently to the *Captain Most* or performed a substantial part of his work aboard that vessel or any other vessels having any connection with defendant. Cf. *Bach v. Trident Shipping Co., Inc.*, 708 F.Supp. 772 (E.D.La. 1988).

Plaintiff's argument that each pilot who guides a vessel into port in Virginia is permanently attached to that vessel for that period of time is unpersuasive to this Court. As this Court stated in *Complaint of Falkiner (Sailing Vessel Wan Fu)*, 1989 AMC 796, 808 (E.D.Va. 1988), "the connection may be less permanent...but it cannot be temporary or transitory."

In this case, plaintiff's relationship to the vessel was solely temporary or transitory. He came aboard only long enough to guide the ship into port. He did not become permanently attached so as to be afforded Jones Act seaman status. *Whittington* says:

> "The Supreme Court has held that the passage of the Longshoremen's and Harbor Workers' Compensation Act...[hereinafter L.H.W.C.A] shows that Congress intended

to '*confine* the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters...'" 541 F.2d at 436 (emphasis added).

Summary judgment is appropriate with regard to plaintiff's Jones Act claim. See *Lewis v. Roland E. Trego & Sons, Inc.*, 359 F.Supp. 1130, 1132 (D.Md. 1973), modified on other grounds, 501 F.2d 372 (4 Cir. 1974). See also Schoenbaum, *Admiralty and Maritime Law*, §5-5 (1987 and 1989 Supp.) (the courts are now routinely denying seaman status in questionable cases and making it clear that the district courts can take this issue away from the jury and decide it on motion for summary judgment or motion for judgment notwithstanding the verdict). Accordingly, because plaintiff in no way satisfies the permanency prong of the Jones Act test, summary judgment for defendant is granted and

plaintiff's claim under the Jones Act is dismissed.

III. *Plaintiff's Status under the Warranty of Seaworthiness*

A grant of summary judgment is appropriate when the case shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Federal Rule of Civil Procedure 56(c)). Such is not the case here.

The warranty of seaworthiness originally arose to protect a narrow class of people - those who qualify as seamen under the law. Schoenbaum, *Admiralty and Maritime Law*, §5-4 (1987). In the case of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 AMC 698 (1946), rehearing denied, 328 U.S. 878 (1946), the

doctrine was expanded to apply to a longshoreman who was not directly employed on the vessel on which his injury occurred. The Court accorded the plaintiff in *Sieracki* seaman status because he was facing the hazards that seamen face and was performing a function essential to maritime service aboard ship. In 1972 Congress amended the LHWCA, providing that no employee covered by the LHWCA may assert a cause of action for unseaworthiness. Congress also expanded the classes of workers covered by the LHWCA.

Defendant vigorously argues that the 1972 amendments to the LHWCA created two mutually exclusive categories of workers - longshoremen and seamen - and that only seamen are entitled to the warranty of seaworthiness. See *Bach*, supra, at 775 (a marine worker is either a seaman or an LHWCA employee [under Fifth Circuit law]). See also *United States Lines*,

Inc. v. United States, 593 F.2d 570, 572 (4 Cir. 1979) (Congress overruled the *Sieracki-Ryan* form of action with the 1972 amendments to the LHWCA). However, *United States Lines, Inc.* dealt with a federal civil service longshoreman who is clearly within the purview of the LHWCA.

The Fourth Circuit has no case directly on point. However, *Whittington*, supra, at 433 and 435, states:

> "There is a failure on the part of the plaintiff to distinguish 'seaman' from 'one who does the work of a seaman.' ...The phrase 'one who does the work of a seaman' is used to define the class of workers who are protected by the warranty of seaworthiness...' and 'it seems that the plaintiff fails to distinguish the scope of the remedy available under the

> Jones Act and the scope of the remedy available under the warranty of unseaworthiness. Since the standards are different under the two theories of recovery, there is a difference in the remedies and coverage."

In *Lewis v. Roland E. Trego & Sons*, 501 F.2d 372 (4 Cir. 1974), this Circuit also states:

> "[plaintiff's] claim of unseaworthiness stands on a different footing [than his Jones Act claim]. The district court properly recognized that a shore-based employee doing a seaman's work on his employer's vessel in navigation can recover for injuries caused by unseaworthiness, although he is not a member of the crew."

It should be noted that both *Whittington* and *Lewis* were decided after the 1972 amendments to the LHWCA.

Defendant contends that this Court's decision in *Wan Fu* is controlling and that *Wan Fu* held that *Sieracki* seamen must satisfy the tests applied to Jones Act seamen in order to be afforded the protection of the warranty of seaworthiness. However, the claimants in *Wan Fu* presented their case on the proposition that, while on board the *Wan Fu*, "they were seamen under the Jones Act and therefore owed a warranty of seaworthiness." *Complaint os Falkiner (Vessel Wan Fu)*, 1989 AMC 796, 798, 803 (1988). That case is not determinative under the present status of the facts in this case.

The state of the law as applied renders summary judgment inappropriate at this point.

See *Stephenson*, supra, 1989 AMC at 729-30, 863 F.2d at 341. There is a factual conflict as to exactly who plaintiff's employer was. There is dispute about the status of the Virginia Pilot's Association. There is an unresolved fact question regarding the amount of freedom the master of a vessel has to accept or reject a pilot from the Virginia Pilot's association and when, if the pilot is undertaken, the pilot actually begins to function as such and when he is or is not employed if he may be rejected. His status must be established as well as his authority and position at the time and place of the alleged injury.

Accordingly, at this time defendant's motion for summary judgment with regard to plaintiff's claim for unseaworthiness is denied without prejudice to raise it again at an appropriate time.

The Clerk is directed to enter judgment for the defendant on the basis of plaintiff's Jones Act claim only.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 8, 1991

No. 90-2351

WALLACE S. HARWOOD, JR.

Plaintiff - Appellee

v.

PARTREDEREIT AF 15.5.81

Defendant - Appellant

No. 90-2359

WALLACE S. HARWOOD, JR.

Plaintiff - Appellant

v.

PARTREDEREIT AF 15.5.81

Defendant - Appellee

On Petition for Rehearing with Suggestion
for Rehearing in Banc

Appellee/cross-appellant filed a petition for rehearing with suggestion for rehearing in banc.

Judge Ervin voted to grant panel rehearing. Judge Chapman and Judge Norton voted to deny.

No member of the Court requested a poll on suggestion for rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Chapman, with the concurrence of Judge Ervin and Judge Norton.

For the Court,

JOHN M. GREACEN

Clerk